Supreme Court of the United States

October Term, 1961

No. 358

LAUREANO MAYSONET GUZMAN,
PETITIONER.

v.

RAMON RUIZ PICHIRILO,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Cases Cited

STATUTES

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v.

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RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To The Honorable The Chief Justice and The Associate Justices of The Supreme Court of The United States.

The petitioner, by his counsel, Max Goldman, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit which reversed the decree in favor of petitioner and dismissed petitioner's libel filed in the United States District Court for the District of Puerto Rico, and in support of his petition, does show:

1. The opinion of the United States Court of Appeals for the First Circuit is not reported as of this date, and is

appended hereto at pages 15-21 *infra*. The opinion of the United States District Court for the District of Puerto Rico was not reported and appears in the certified record at pages 56-58.

2. The judgment of the United States Court of Appeals for the First Circuit vacating the judgment of the District Court of Puerto Rico and remanding for entry of a judgment of dismissal is dated May 29, 1961.

Jurisdiction

The jurisdiction of this Honorable Court to review by way of writ of certiorari is based on United States Code, Title 28, Sections 1254(1) and 2101(c) and Supreme Court Rules, Rule 19, Subsection 1(b).

Questions Presented

3. The questions presented for review are:

A 1. Is a vessel in the possession and control of a demise charterer liable *in rem* for injuries to a longshoreman caused by the unseaworthiness of the vessel, if the unseaworthy condition is created while the demise charterer is in possession and control?

A 2. Is a vessel in the possession and control of a demise charterer liable *in rem* for injuries to a longshoreman caused by the unseaworthiness of the vessel, if the unseaworthy condition is created while the demise charterer is in possession and control, and if the demise charterer is also the stevedore-employer insured under a system of workmen's compensation?

These questions comprise other issues e.g.: whether a vessel may be liable *in rem* for unseaworthiness if there is

no *in personam* liability on the part of the owner or demise charterer; whether the longshoreman's right to a seaworthy vessel is extinguished by his employer becoming the demise charterer; whether the shipowner's duty to furnish a seaworthy vessel may be contracted away by the device of a demise charter; and, whether the stevedore-employer can avoid the obligation of indemnifying the shipowner for an unseaworthy condition that he, the employer, creates by acquiring the vessel under a demise charter.

B. Does the Court of Appeals have the power to reverse findings of fact, based in whole or in part upon the credibility of witnesses, in an admiralty matter on its own independent reading of the record?

Necessarily contained in this question are the subsidiary questions of whether an appeal in admiralty is a trial *de novo* and whether a Court of Appeals has the right to reverse the District Court's findings if not clearly erroneous.

4. The constitutional provisions involved are:
United States Constitution, Article 3, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citi-

zens thereof, and foreign States, Citizens or Subjects."

The statute involved is:

Laws of Puerto Rico Annotated, Title 11, Section 21:

"When an employer insures his workmen or employees in accordance with this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, the workmen or employees not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be, the same as if this chapter did not exist."

Statement of the Case

The petitioner, a longshoreman, was injured on board the M/V Caribe, of Dominican registry, when the shackle on the boom broke causing it to fall and strike him on the head. He sustained severe and permanent injuries. Suit was commenced in the United States District Court for the District of Puerto Rico, in Admiralty, by a libel filed on December 5, 1958.

Jurisdiction was based on the admiralty and maritime jurisdiction of the United States and both *in rem* and *in personam* remedies were sought against the vessel and the owner. The vessel was seized, pursuant to lawful process on December 10, 1958. The vessel and owner appeared on December 23, 1958 by filing a claim in the form of a motion.

In the answer, the respondents averred that the vessel had been "chartered" to Bordas & Co., of San Juan, Puerto

Rico, the stevedore employer of the petitioner. The affirmative defenses alleged, inter alia, the receipt of compensation by petitioner, and the charter and surrender of control of the area wherein the accident occurred.

Introduced into evidence at the trial was a deposition of the master, a Dominican, who characterized himself as an employee of the respondent and referred to the stevedore as a third-party, incorrectly translating its name into Spanish. Aside from a physician, the only witness who appeared for the respondents was the principal officer of the stevedore employer. He testified:

> "Q. Will you please state your connection with Ruiz Pichirilo in this case? A. He has been a business relation of ours for many years. We have been managing and operating the "Carib" for around five years. He lives in the Dominican Republic." (R. 51).

At the close of all the testimony, respondent's proctor requested time to file a memorandum based on the defense that Ramon Ruiz Pichirilo was not liable because he had no control of the vessel. Thereupon the following colloquy took place:

> "The Court: Of course, you know pretty well the doctrine in Admiralty that there is a non-delegable duty, no matter who was managing this thing, or who was paying for the payroll and expenses and everything. Mr. Bordas clearly stated that the boat belongs to Pichirilo, and if Pichirilo isn't coming here it is because he can not leave the Dominican Republic, but he is the owner, the operator of the boat.
>
> "Mr. Rodriguez: No, the owner, not the operator. The operator is Bordas and Company.

"The Court: That may be what you think, but I don't believe that Bordas is the operator of the boat." (R. 55).

No contracts, charter parties nor any other document corroborating Bordas' interest in the vessel was offered. In its opinion the District Court stated that it could find no lawful basis for holding that the vessel was under a demise charter (R. 57) and in its findings found that the owner was in possession and control of the M/V CARIB. (R. 58).

The United States Court of Appeals did not question the fact that the vessel was unseaworthy. The reversal was predicated upon this Court's interpretation that the evidence showed a demise charter by parole and could admit no other interpretation. A demise charterer being *pro hac vice* the owner, the Court of Appeals reasoned, the true owner could not be liable *in personam*. Despite the fact that the demisee created the unseaworthy condition, it could not be liable *in personam* because as stevedore-employer it was insulated by the exclusive remedy provisions of the Workmen's Accident Compensation Act of Puerto Rico.

The Court of Appeals then held that a vessel could not be liable *in rem*, if there were no *in personam* liability, even if the vessel were unseaworthy and it ordered the dismissal of the libel.

In its opinion, the Court of Appeals for the First Circuit frankly admitted that its holding was directly in conflict with decisions of other United States Courts of Appeals and other United States District Courts.

Argument

A. The Court of Appeals for the First Circuit Has Decided a Federal Question Directly in Conflict with Decisions of Other Courts of Appeals and Other Federal District Courts.

The decision of which review is sought is irreconcilable with three decisions of the United States Court of Appeals for the Second Circuit.

Grillea v. *United States*, 1956, 232 F2 919,
Burns Bros. v. *The Central R.R. of New Jersey*, 1953, 202 F.2d 910.
Cannella v. *Lykes Bros. S.S. Co.*, 1949, 174 F2 794, certiorari denied, 338 U.S. 859, 70 S. Ct. 102, 94 L. Ed. 526.

Despite the reliance upon the decision as authority, it is submitted that the opinion of the court below is irreconcilable with the decision of the United States Court of Appeals for the Fourth Circuit in *Noel* v. *Isbrandtsen Co.*, 1961, 287 F2 783.

Chronologically, the first case involving some of the precise issues involved in the case at bar was *Vitozi* v. *Balboa Shipping Co.*, 1 Cir., 1947, 163 F2d 286, wherein it was held that an owner who had surrendered control by a demise was not liable *in personam* for unseaworthiness.

Libellant, in that case, a longshoreman, later filed an *in rem* action against the vessel in the Southern District of New York. That case was dismissed upon the ground that the demisee was the stevedore-employer whose liability under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. 905, was exclusive and the vessel,

being his under the demise, was not a third person within the meaning of the statute.

Vitozi v. *S.S. Platano*, D.C.S.D.N.Y., 1948, 1950 A.M.C. 1686.

At least insofar as unseaworthy conditions which arose prior to the demise, the Second Circuit held just the opposite from the First Circuit's decision in *Vitozi* and this Court seemingly concurred by refusing to grant certiorari.

Cannella v. *Lykes Bros. S.S. Co.*, 1949, 174 F2d 794, certiorari denied, 338 U.S. 859, 70 S. Ct. 102, 94 L. Ed. 526.

In *Burns Bros.* v. *The Central R.R. of New Jersey*, 1953, 202 F2d 910, the Second Circuit held that even though no *in personam* liability attached to an owner out of possession for collision damage caused by negligent navigation, the vessel was nevertheless liable for the damages *in rem*. Moreover, Judge Hand, after tracing the historical development of *in rem* actions, concluded that a prior favorable decree *in personam* would not bar a subsequent action *in rem*, if the *in rem* remedy were unavailable at the time the *in personam* suit was brought.

All of the issues presented in the instant case were presented in *Grillea* v. *United States*, 2 Cir., 1956, 232 F2d 919 and Judge Learned Hand decided each of them exactly contrary to decision now rendered by the Court of Appeals for the First Circuit. In *Grillea*, the respondents asserted that no maritime lien could be imposed where no jural person is liable *in personam*, citing, just as did the court below, *The Western Maid*, 257 U.S. 419, 42 S. Ct. 159, 66 L. Ed. 299. Judge Hand held that the decision in that case was altogether foreign to the case of private wrongs.

Thus we have a situation existing wherein on the identical operative facts a longshoreman can recover for injuries caused by unseaworthiness in the Second Circuit and in the First Circuit he can not.

Since the decision in *Grillea*, the precise questions involved herein have arisen in two other District Court cases both of which have followed the decision of the Second Circuit.

In *Reed* v. *The Yaka*, D.C.E.D., 1960, 183 F. Supp. 69, all of the cases cited by the Court of Appeals in the instant case were rejected by the Judge who imposed liability *in rem*. The fact that ultimate responsibility for payment of the judgment may fall upon the employer whose liability is exclusive was held to have been answered conclusively by this Court in *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133.

Furthermore, it was pointed out that if argument of the respondent were adopted, the holding of *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, would be vitiated.

183 F. Supp. at page 76.

The Court of Appeals for the First Circuit, however, adopted that argument and has thus vitiated *Sieracki*.

In *Leotta* v. *The SS Esparta*, D.C.S.D.N.Y., 1960, 188 F. Supp. 168, the precise issues involved in the case at bar arose again. Faced with the obvious conflict between *Vitozi* v. *S.S. Platano*, D.C.S.D.N.Y., 1948, 1950 A.M.C. 1686 and *Reed* v. *The Yaka*, D.C.E.D. Pa. 1960, 183 F. Supp. 169, the trial judge ruled that the *Reed* decision was correct, basing his conclusion on *Grillea* and *Ryan*.

The decision in the instant case recognizes the irreconcilability of its position with *Grillea*, *Reed* and *Leotta*, but insists that they are wrong.

As authority for its position, the First Circuit relies upon the decision of *Noel* v. *Isbrandtsen Company*, 1961, 4 Cir., 287 F2d 783. It is submitted that *Noel*, too, is directly in conflict with the opinion below. In *Noel*, the libellant was not entitled to a seaworthy vessel; the vessel, having been permanently withdrawn from navigation, did not warrant its seaworthiness; and, there was a finding that there was no negligence. The *in rem* action was dismissed, the Court saying:

> "We know of no precedent for requiring her to respond as an absolute insurer for personal injury where there has been no violation of any warranty of unseaworthiness and it is not established that anyone connected with her has been at fault."
>
> 287 F2d at page 787.

May it seriously be contended that the quoted language is authority for holding that no *in rem* liability may be imposed when the unseaworthiness is conceded, and in fact, was never contested?

Until the decision in the case at bar, it was obvious that *Grillea* was the law. Now, the law is confusion and the conflict, it is respectfully submitted, can be resolved only by this Court.

B. The Court of Appeals for the First Circuit Has Decided a Question of Admiralty and Maritime Law in Conflict with the Authoritative Decisions of This Court.

a) In a long line of decisions this Court has held that *in rem* liability may be imposed, even when the owner may not be liable *in personam*.

For piracy, in the absence of privity or knowledge on the part of the owner, ships were held subject to forfeiture.

The Palmyra, 25 U.S. (12 Wheat) 1, 6 L. Ed. 531.
The Malek Adhel, 43 U.S. (2 How.) 210, 11 L. Ed. 239.

A vessel is liable *in rem* for collision damage caused by the negligence of a compulsory pilot.

The China, 74 U.S. (7 Wall.) 53, 19 L. Ed. 67.

Sixty years ago admiralty lawyers recognized that a vessel, demised under a charter, was liable *in rem*, for collision damage. The only issue that came before this Court was whether the owner or demisee bore ultimate responsibility under the charter party.

The Barnstable, 181 U.S. 464, 21 S. Ct. 684, 45 L. Ed. 954.

More recently, this Court awarded recovery to a libellant, also a longshoreman, against the vessel although it had been chartered under a demise, where the demisee was not the stevedore-employer.

Crumady v. *The Joachim Hendrik Fisser*, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413.

Exceptions to the imposition of liability *in rem* exist when the injured party has exonerated the vessel's owner in advance or when the lien is sought because of a wrongful act of the sovereign for which it has not consented to be sued.

Queen Of The Pacific, 180 U.S. 49, 21 S. Ct. 278, 45 L. Ed. 419.
The Western Maid, 257 U.S. 419, 42 S. Ct. 159, 66 L. Ed. 299.

The First Circuit has applied the exceptions where they are inapplicable because the instant case involved no exoneration and no sovereign.

b) Until the decision of the court below it was axiomatic that a shipowner could not contract away or delegate his duty to furnish or maintain a seaworthy vessel to all those entitled to such a warranty.

Mahnich v. *Southern Steamship Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561.

Seas Shipping Co. v. *Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099.

Pope & Talbot, Inc. v. *Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143.

Alaska S.S. Co., Inc. v. *Petterson*, 347 U.S. 396, 74 S. Ct. 601, 98 L. Ed. 798.

Rogers v. *United States Lines*, 347 U.S. 984, 74 S. Ct. 849, 98 L. Ed. 1120.

Crumady v. *The Joachim Hendrick Fisser*, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413.

United New York and New Jersey Sandy Hook Pilots Ass'n. v. *Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541.

Mitchell v. *Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941.

The fact that the stevedore-employer, against whom suit may not be brought, may ultimately have to indemnify the shipowner does not in any way affect the injured worker's right against the shipowner or the vessel.

Ryan Stevedoring Co., Inc. v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133.

Crumady v. *The Joachim Hendrick Fisser*, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2, 413.

What the respondent has done is to set up a bare boat charter to contract for the sole responsibility for unseaworthiness and then set up the Workmens Accident Compensation Act of Puerto Rico as a bar to recovery What is invited by the decision below are contracts for situations such as exist here, for the sole purpose of destroying a longshoreman's *in rem* remedy. No more was the Puerto Rican Statute, 11 L.P.R.A. 21, enacted to diminish the longshoreman's rights than was the federal statute, 33 U.S.C. 905.

Reed v. *The Yaka*, D.C.E.D. Pa., 1960, 183 F. Supp. 69, 75-77.

If the decision of the United States Court of Appeals for the First Circuit is not reversed, the principles laid down in all of the cases subsequent to *Sieracki* would become empty words.

c) The Court of Appeals for the First Circuit has violated the standards set by this Court in reviewing findings of the District Court, sitting without a jury in admiralty. The findings of the District Court may not be set aside unless clearly erroneous.

McAllister v. *United States*, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20.

At the trial there was conflicting evidence. No documents, contracts, charter-parties or correspondence was offered by the respondents to corroborate the existence of a demise. The trial judge stated on the record that he did not believe that the stevedore-employer was operating the vessel (R. 55) and he formally so found. (R. 58)

Conceding *arguendo* that a demise charter may be established by parole, although aside from harbor craft there is no modern example of such practice in the shipping industry, this Court has stated:

> "Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer."
>
> *Reed* v. *United States*, 78 U.S. (1 Wall), 391, 20 L. Ed. 220.

The action of the United States Court of Appeals for the First Circuit was not a review at all. It was a trial *de novo*, without benefit of demeanor evidence.

It is urged that the findings of the District Court are not only not clearly erroneous but that they are manifestly correct.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit in this cause and this Court should review and reverse the decision of the Court of Appeals.

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Appendix

United States Court of Appeals
For the First Circuit

No. 3650.

RAMON RUIZ PICHIRILO,

RESPONDENT, APPELLANT,

v.

LAUREANO MAYSONET GUZMAN,

LIBELLANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before WOODBURY, *Chief Judge*, and MARIS* and ALDRICH, *Circuit Judges*.

Seymour P. Edgerton, with whom *Ionias Rodriguez Moreno*, *Hiller B. Zobel*, *W. C. Moffett* and *Bingham, Dana & Gould* were on brief, for appellant.

Harvey B. Nachman, with whom *Stanley L. Feldstein* and *Golenbock, Nachman & Feldstein* were on brief, for appellee.

OPINION OF THE COURT.
May 29, 1961.

ALDRICH, *Circuit Judge*. This is a libel in rem against the M/V Caribe and in personam against her owner (hereinafter respondent) for personal injury sustained by libellant, a longshoreman employed by Bordas & Co., a stevedoring concern engaged in discharging the vessel in the port of San Juan, Puerto Rico. The sole claim is for unseaworthiness, the injury having been caused by an admittedly defective shackle, recently bought. The defense was that the vessel was under demise charter to Bordas.

* Sitting by designation.

The court ruled that the evidence showed no such charter.[1] This ruling was wrong. A demise charter may be, as this one was claimed to be, by parole. *James* v. *Brophy*, 1 Cir., 1895, 71 Fed. 310, 312. We do not gather the court thought otherwise. We believe the court was misled by testimony of Bordas' representative that the arrangement was not the usual charter party (although he added that "it is a kind of a charter").[2] The witness, a layman, was not qualified to draw legal conclusions. Moreover, his reservations appear to have been that it was neither a time charter, nor a bare boat charter, rather than that there was no charter at all. A demise, of course, is not a time charter, and it need not be of a bare boat. *United States* v. *Shea*, 1894, 152 U.S. 178.

The evidence showed that respondent, permanently residing within the Dominican Republic, had had no connection with the operation of the Caribe for some five years, except that he had appointed, or "employed," the master. That action would not mean a control of the vessel so as to prevent a demise. See *United States* v. *Shea*, *supra*; *Grillea* v. *United States*, 2 Cir., 1956, 229 F.2d 687, 689-90; *The Willie*, 2 Cir., 1916, 231 Fed. 865. Bordas' representative testified, without contradiction, that the master was under Bordas' orders. Bordas paid the master, the crew, and all expenses of the vessel, and paid respondent a flat monthly sum. The suggestion that it was merely an agent for respondent is without merit. Libellant offers no ex-

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[1] We are satisfied on the record that with characteristic forthrightness the court did not seek to avoid the necessity of ruling by making a finding that it did not believe testimony which in fact it did believe. Under these circumstances, and since, in addition, this evidence was inherently credible and undisputed, we will accept it without the necessity of remand. See *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 1 Cir., 1960, 284 F.2d 582, 587, *cert. den.*, 365 U.S. 833; *Texas Co.* v. *R. O'Brien & Co.*, 1 Cir., 1957, 242 F.2d 526, 529.

[2] Actually, the court inaccurately quoted the witness as having said, "something like a charter, but not a charter."

planation why an agent should be making fixed monthly payments to a principal, rather than the reverse. We hold the evidence indisputably shows that Bordas was operating the ship as a demisee. *Reed* v. *United States*, 1870, 78 U.S. (11 Wall.) 591, 601 ("possession, command, and navigation").

In *Vitozi* v. *Balboa Shipping Co.*, 1 Cir., 1947, 163 F.2d 286, we held that an owner who has surrendered all control by demise was not liable in personam for unseaworthiness. Possibly we erred in extending this rule indiscriminately to cases where the unseaworthy condition preceded the demise. See *Cannella* v. *Lykes Bros. S.S. Co.*, 2 Cir., 1949, 174 F.2d 794, 795, *cert. den.*, 338 U.S. 859. But we see no reason to reconsider when, as here, the defective condition arose only after the owner had parted with all possession. See *Grillea* v. *United States*, *supra*, at 689, 690. The judgment in personam against respondent must be set aside.

Respondent, as claimant to the vessel, also asks us to dismiss the libel in rem. Since Bordas' obligations under the Puerto Rico Workmen's Compensation Act represent its exclusive liability to its employees, 11 L.P.R.A. ch. 1, §21, an obligation obviously not here involved, and since the owner of the vessel is not personally liable at all, respondent contends that the vessel should not be independently charged. We agree.

It is generally accepted that the in rem action in admiralty and the maritime lien are correlative. "Where one exists, the other can be taken, and not otherwise." *The Rock Island Bridge*, 1867, 73 U.S. (6 Wall.) 213, 215; see *The Resolute*, 1897, 168 U.S. 437, 440; *The Lottawanna*, 1874, 88 U.S. (21 Wall.) 558, 581; 1 Benedict, Admiralty 18 (6 ed. Knauth 1940); Gilmore & Black, Admiralty 510 (1957); Price, Maritime Liens 12 (1940); Robinson, Admiralty 362 (1939). This does not solve our problem, because we could hold that a lien had arisen from a claim against the ship

notwithstanding the absence of a claim against any distinct juridical person, but it does focus attention on the necessity of an underlying claim. The concept of a ship as an individual may have an aura of romance befitting the lore of the sea, but to regard it as an entity having separate responsibilities independent of the primary legal responsibility of some human actor has little rational appeal. This is not to say that the "personification" of the vessel is not a convenient shorthand method of expressing legal results. See Price, Maritime Liens 16 (1940); Hebert, "The Origin and Nature of Maritime Liens," 1930, 4 Tul. L. Rev. 381, 392. It is something else to use the characterization to achieve them.

In a variety of situations courts have refused to charge the ship when neither the owner nor the party in possession, nor the agents of either, were personally liable. In *Queen of the Pacific*, 1901, 180 U.S. 49, it was argued that a stipulation in a bill of lading requiring all claims against a shipowner to be brought within a certain time did not prevent an in rem action against the vessel after that time. The court rejected this, saying, "The '*claim*' is in either case against the company, though the *suit* may be against its property." 180 U.S. at 53. (Ital. in orig.) In *The Oceanica*, 2 Cir., 1909, 170 Fed. 893, 898, *cert. den.*, 215 U.S. 599, it was alleged that a tug had negligently caused the loss of her tow. The towage contract exempted the tug owner from negligence.[3] The Court refused to charge the tug. That this was not simply a question of contractual interpretation is made clear by *The Elizabeth M. Miller*, D.C.W.D.N.Y., 1932, 3 F.Supp. 171, 172-73, where the tug was operated by an allegedly exempted demisee. *The Western Maid*, 1922, 257 U.S. 419, involved several collisions in which vessels owned outright or *pro hac vice* by

[3] *But see Bisso* v. *Inland Waterways Corp.*, 1955, 349 U.S. 85.

the United States were assumed to be at fault. Sovereign immunity at that time prevented suits against the government. The court refused to hold that a lien had attached which was enforceable when the ship passed into private hands. More recently, in *Noel* v. *Isbrandtsen Co.*, 4 Cir., 1961, 287 F.2d 783, in rem liability was not established because of the failure to show any personal obligation owed to the libellant to furnish a seaworthy ship.

There is nothing in the doctrine of unseaworthiness that should lead to a different result. It is true that one speaks of unseaworthiness "of the vessel" and of "liability without fault," but this cannot obscure the fact that liability depends upon a legal obligation growing out of a relationship between individuals: the injured party and the one charged with preventing the injury.[4] See *United New York and New Jersey Sandy Hook Pilot Association* v. *Halecki*, 1959, 358 U.S. 613, 616; *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 95-96; *id.* at 104 (dissenting opinion); *Mahnich* v. *Southern Steamship Co.*, 1944, 321 U.S. 96, 100, 103-04; *The Osceola*, 1903, 189 U.S. 158, 171, 175; *cf. Grillea* v. *United States*, *supra*, at 690. A ship does not make a warranty. Whether one speaks in terms of holding out, *cf. West* v. *United States*, 1959, 361 U.S. 118, 122, or duty owed, *Halecki*, *supra*, unseaworthiness liability requires something more than a mere defective condition of the vessel. See *Noel* v. *Isbrandtsen Co.*, *supra*.

In *Smith* v. *The Mormacdale*, 3 Cir., 1952, 198 F.2d 849, *cert. den.*, 345 U.S. 908, a longshoreman who was limited in his rights against his employer by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-50,

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[4] Liability without fault in analogous situations has not led courts to describe the result as other than an adjustment of loss between the parties involved. See, *e.g.*, *Exner* v. *Sherman Power Constr. Co.*, 2 Cir., 1931, 54 F.2d 510, 512-14. See generally, Prosser, Torts 317-18 (2d ed. 1955).

was held unable to proceed against the vessel which was owned by his employer, although the vessel's unseaworthy condition was alleged. Following the teaching of the cases earlier discussed, we are not prepared to reach a different conclusion simply because title to the vessel is in the hands of another party who is also not personally liable. *Cf. Pedersen* v. *Bulklube*, D.C.E.D.N.Y., 1959, 170 F.Supp. 462 466-67, *affirmed*, 274 F.2d 824, *cert. den.*, 364 U.S. 814; *Vitozi* v. *Platano*, D.C.S.D.N.Y., 1948, 1950 A.M.C. 1686; *The Elizabeth M. Miller*, D.C.W.D.N.Y., 1932, 3 F. Supp. 171, 172-73 (dictum). *But see Leotta* v. *The S.S. Esparta*, D.C.S.D.N.Y., 1960, 188 F. Supp. 168, 169, *infra; Reed* v. *The Yaka*, D.C. E.D. Pa., 1960, 183 F. Supp. 69, *infra*. Nor, by some process of inverse reasoning, does this lead us to say that a demisor is personally liable for a condition of unseaworthiness created by the demisee. It should be enough that his ship is subject to a lien to secure whatever obligation the demisee has personally incurred in his operation of the ship. See *The Barnstable*, 1901, 181 U.S. 464.

It is true that in *Grillea* v. *United States*, 2 Cir., 1956, 232 F.2d 919 (2-1), the court reached the opposite result. It did so without discussion, and with only the simple statement, "we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam.'" 232 F.2d at 924. With all deference we think so novel a principle needs more support than a statement that the court sees no reason against it. *Grillea* seems the more surprising in that Judge Hand, the writer of the majority opinion, had observed not long before, after discussing the ancient doctrine of deodand, "Disputes arise between human beings, not inanimate things; . . . a vessel . . . is, and can be, nothing but the measure of [claimant's] stake in the controversy." *Burns Bros. v. The Central R.R. of New Jersey*, 2 Cir., 1953, 202 F.2d 910, 913.

Grillea has resulted in some discussion of the effect of an indemnity clause in the demise. *Leotta* v. *The S.S. Esparta*, D.C.S.D.N.Y., 1960, 188 F. Supp. 168. See also *Reed* v. *The Yaka*, D.C.E.D. Pa., 1960, 183 F. Supp. 69. We would agree with *Yaka* that the existence of an indemnity clause is beside the point. But we cannot agree with *Yaka* that the fact that the demising owner is eventually going to get the boat back is determinative. This was answered by *The Western Maid*, *supra*. *Cf. Pedersen* v. *Bulklube*, *supra*.

We do not reach respondent's other contentions, one of which appears to have some merit.

Judgment will be entered vacating the judgment of the District Court and remanding the action for entry of a judgment of dismissal.